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8 **UNITED STATES DISTRICT COURT**
9 **NORTHERN DISTRICT OF CALIFORNIA**
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11 FIREMAN'S FUND INSURANCE)	CASE NO.: 3:07-cv-06302-CRB
COMPANY, a foreign corporation a/s/o)	
12 BASIC RESOURCES, INC. and GEORGE)	DEFENDANT HDI-GERLING AMERICA
REED, INC., a foreign corporation,)	INSURANCE COMPANY'S BRIEF ON
13)	CHOICE OF LAW PURSUANT TO
Plaintiff,)	MARCH 28, 2008 BRIEFING ORDER
14)	
vs.)	
15)	
GERLING AMERICA INSURANCE)	
16 COMPANY, a foreign corporation,)	
17)	
Defendant.)	

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19
20 Defendant HDI-Gerling American Insurance Company ("Gerling") submits this Brief on
21 which state's substantive law governs the interpretation of the terms of the Gerling insurance policy
22 pursuant to this Court's Briefing Order dated March 28, 2008.
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1 MEMORANDUM OF POINTS AND AUTHORITIES

2 1. INTRODUCTION

3 Pursuant to the choice of law rules of Florida, the original forum state of this action, the law
4 of the State of Florida should govern the interpretation of terms of the Gerling policy.

5 2. FACTUAL BACKGROUND

6 Gerling is an insurance company that conducts business throughout the United States.
7 Gerling insures Gencor Industries, Inc. ("Gencor") under a Commercial Lines Policy, policy
8 number 4003-527-GLP, with applicable effective dates of 6/30/2000 through 6/30/2001. This
9 policy, issued by Gerling in New York, was negotiated for Gencor, a Florida-based company, by
10 Sedgwick of Florida, Inc., a Florida-based broker.

11 On or about February 2000, Gencor manufactured and sold a 12,000 lb. stationary batch
12 asphalt plant ("plant") to Basic Resources and George Reed, California-based companies. The plant
13 was shipped and assembled in California. On April 18, 2001, a Gencor service technician arrived at
14 the site to perform a "dry run" test of the plant. An explosion ensued which destroyed a significant
15 portion of the plant. Fireman's Fund Insurance Company ("FFIC"), as insurer for Basic Resources
16 and George Reed, investigated and eventually paid approximately \$1.3 million to its insureds.

17 On or about September 2004, FFIC, as subrogee of Basic Resources and George Reed, sued
18 Gencor for breach of contract and negligence for the damages to the plant. This action was held in
19 a Florida state court pursuant to a venue selection provision in the contract between Gencor and
20 Basic Resources/George Reed. Gerling defended Gencor under a reservation of rights. Following
21 trial, a jury found for FFIC and a "*non in personam*" judgment was entered on behalf of FFIC in the
22 amount of \$1,751,913.10 solely on the breach of contract cause of action.

23 Gerling has declined coverage for FFIC's claims against Gencor pursuant to express policy
24 provisions and exclusions. The "*non in personam*" judgment obtained by FFIC does not trigger
25 Gerling's obligation to indemnify as this type of judgment does not legally obligate its insured to
26 pay damages as required under the policy. Additionally, the Gerling policy does not provide
27 coverage for FFIC's breach of contract damages, the only damages that were entered as final
28 judgment, pursuant to an express "Contractual Liability" exclusion. Other applicable policy

1 exclusions include the “Damage to Your Product Exclusion,” “Engineers, Architects, Or Surveyors
2 Professional Liability Exclusion,” “Damage to Your Work Exclusion” and “Damage to Property
3 Exclusion.”

4 On May 2, 2007, FFIC filed this diversity action for Declaratory Relief and Breach of
5 Contract in the United States District Court for the Southern District of Florida. On December 6,
6 2007, the Southern District of Florida granted Gerling’s motion to transfer venue pursuant to 28
7 U.S.C. § 1404(a). The action was then transferred to this Court on December 7, 2007.

8 3. DISCUSSION

9 A. The Law of the State of Florida Governs Interpretation of the Gerling Policy

10 As stated in FFIC’s Second Amended Complaint, this action is in federal court due to
11 diversity jurisdiction pursuant to 28 U.S.C. § 1332. Second Amended Complaint (“SAC”), ¶ 5. A
12 district court, having obtained jurisdiction through diversity of citizenship, is bound to apply the
13 substantive law of the state in which it is located. *Erie R.R. v. Tompkins*, 304 U.S. 64 (1938). This
14 principle applies to a state’s law regarding choice of laws. *Klaxon Co. v. Stentor Electric Mfg. Co.*,
15 313 U.S. 487, 496 (1941). With regard to transfer of venue, the transferee court must continue to
16 apply the law of the transferor state in a diversity action. *Van Dusen v. Barrack*, 376 U.S. 612, 637-
17 639 (1964). As such, the State of Florida’s law regarding choice of law applies in this action.

18 (1) Florida’s Choice of Law Rules Governing the Interpretation of Insurance 19 Contracts

20 In Florida, the rights and obligations of the parties under an insurance policy are governed
21 by contract law, because they arise out of an insurance contract. *Lumbermens Mut. Cas. Co. v.*
22 *August*, 530 So.2d 293, 295 (Fla. 1988). In determining which state’s laws applies to contracts,
23 Florida adheres to the rule of *lex loci contractus*. *State Farm Mut. Auto. Ins. Co. v. Roach*, 945
24 So.2d 1160, 1163 (Fla. 2006). That rule, as applied to insurance contracts, provides that the law of
25 the jurisdiction where the contract was executed governs the rights and liabilities of the parties in
26 determining an issue of insurance coverage. *Id.*; see also *Goodman v. Olsen*, 305 So.2d 753, 755
27 (Fla. 1974) (stating that Florida courts, when confronted with questions regarding the interpretation
28 of a contract, have applied the law of the state where the contract was made or to have been

performed); *Jemco, Inc. v. United Parcel Service, Inc.*, 400 So.2d 499, 500 (Fla. Dist. Ct. App. 1981),
 rev. denied 412 So.2d 466 (Fla. 1982) (“Under the law of Florida, . . . , a contract is made at the
 place where the last act necessary to complete the contract is done.”).

(2) Application of Florida’s Choice of Law Rules

Under the choice of law rules of Florida, the substantive law of Florida should govern the
 interpretation of the Gerling policy in this case. The Gerling policy was negotiated by a Florida-
 based broker for a Florida insured. Additionally, the Gerling policy contains an endorsement
 entitled “Florida Changes – Cancellation and Nonrenewal” because Florida was the state of
 contracting for the policy. While the plant was purchased by California-based companies,
 assembled in California and exploded in California, causing the damage at issue in this action, these
 factors would not be considered in this choice of law determination.¹ Florida is the state in which
 the Gerling policy was executed and Florida’s substantive laws should govern the interpretation of
 the policy.

In the event that Florida law has not addressed or its jurisprudence is incomplete with regard
 to specific issues related to the interpretation of Gerling policy, this Court should consider relevant
 California law given California’s contacts to this action.

4. CONCLUSION

For the foregoing reasons, Gerling respectfully submits that the substantive law of the State
 of Florida governs the interpretation of the terms of the Gerling policy.

Dated: April 1, 2008

BARGER & WOLEN LLP

By: /s/ Tino X. Do
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¹ The Florida Supreme Court has noted that it has considered and rejected the significant
 relationship test for use with respect to “issue[s] of insurance coverage.” *Roach*, 945 So.2d at 1163
 (citing *Sturiano v. Brooks*, 523 So.2d 1126, 1129 (Fla. 1988)).